



Please note that this is general information & may not be relevant to your particular matter. This toolkit should not be taken as legal advice.

Underpayments

Have you been paid incorrectly?

Wage theft is failure of an employer to pay a worker their wages or entitlements, such as superannuation, penalty rates, loadings or allowances under workplace laws. It impacts up to 170,000 South Australian workers and collectively costs more than \$500 million a year.

Findings from "The Economic Impact of Wage Theft in South Australia" published by The McKell Institute, in March 2019.

If you feel your current or former employer has underpaid you by:

- Not paying you at the correct award rate;
- Not paying you penalty rates or the incorrect rate;
- Not paying you allowances or other loadings;
- Not paying your superannuation
- Not paying the correct notice upon termination of your employment
- Not paying the correct amount of redundancy pay
- Not paying out your long service leave or annual leave entitlements correctly

Then you may be able to lodge a Money Claim in the South Australian Employment Tribunal (SAET). You may also be able to lodge a small claim in the Fair Work Division in the Federal Circuit Court.

You have six years from the date of the underpayment to make a claim.

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Part 1: Figuring out what you are owed

You will need to find out the wage to which you are legally entitled. This will either be set out in a Modern Award, in your contract of employment or in an enterprise bargaining agreement. These are explained below. All employees, as a minimum, are entitled to the National Employment Standards.

The National Employment Standards set out the 10 minimum employment entitlements that must be provided to all employees, including the national minimum wage, and other entitlements such as leave, and flexible working arrangements. Casuals and permanent employees have different entitlements. Find out more on the Fair Work Ombudsman website:

<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>

Modern awards

Most employees are covered by an award. There are 122 modern awards in Australia. An award is a legal document that sets out the minimum pay rates and conditions of employment for an industry. Awards are not specific to your employer but rather specific to your industry/sector. The Fair Work Commission sets the conditions and rates found in the modern awards. The Fair Work Commission reviews all 122 awards every 4 years. Different awards apply for different industries and job types.

You can find your award and your correct pay rate on the Fair Work Ombudsman site:

<https://calculate.fairwork.gov.au/findyouraward>

If you are unsure if the award applies to you, check the coverage clause (usually clause 4) and the job classifications (usually in the pay clause or a schedule) to read more about the types and levels of jobs it covers.

All awards are available in full on the [Fair Work Commission website](#).

Enterprise Agreements

Enterprise bargaining agreements (EBA), and other registered agreements such as individual flexibility arrangements, are negotiated between employees, employers and most often unions. They set out minimum employment conditions for employees of an employer. The law says that an EBA must leave an employee better off overall when compared to the relevant award. EBAs are voted on by the workforce and there should be a copy of your EBA made available to you, if one applies.

If your workplace has an EBA, you should check it first to find the wage to which you are entitled. Some agreements state that the award doesn't apply, and provide better entitlements than the award. The base pay rate in the agreement can't be less than the base pay rate in the award and the National Employment Standards still apply.

Other agreements may say that the award applies, where the agreement does not include detail about your entitlements. In this case, refer to your award.

Find your agreement on the Fair Work Commission site.

<https://www.fwc.gov.au/search/document/agreement>

How to calculate your underpayment

Examine your payslips or other records (like rosters, bank statements, cash receipts) to figure out how much you were paid, and how much you should have been paid for the hours you worked under the award or your workplace's registered agreement. The difference in these two figures is the amount you can claim as an underpayment.

You may find it helpful to use an Excel spreadsheet or table to calculate the underpayment per pay period. If you do not have full records of your hours worked, you can use a reasonable estimate.

Remember that you can claim other unpaid entitlements, such as superannuation, annual leave, long service leave, and notice. If you are claiming unpaid wages, you can add superannuation of 9.5% (or the amount listed in your registered agreement) of the underpayment amount to your claim.

Your underpayment is calculated as follows:

(legal entitlement) minus (actual wages paid) = (underpayment figure).

Example: Phuong's underpayment

Phuong is a permanent part-time employee in a restaurant. She works 20 hours a week. She is paid \$15 per hour.

Phuong's duties include taking reservations, mixing and serving alcoholic drinks, waiting on tables and helping to supervise junior staff. She examines the Restaurant Industry Award 2010, and realises that her duties are classified at "Level 3 – food and beverage attendant". Under the Award, she should have been paid at \$26.93 per hour during the day, \$32.31 per hour on Saturdays and \$37.70 per hour on Sundays and public holidays.

She goes through her payslips and her time sheets and calculates that over the period of her employment, she was paid \$15,600. However, if she had been paid at the correct award rates, she should have been paid \$26,603.

Phuong's underpayment of wages is \$26,600 (legal entitlement) minus \$15,600 (actual wages paid) = **\$11,000** (underpayment figure).

She adds an additional 9.5% (\$1045) of this amount to her claim as unpaid superannuation.

Other entitlements

When Phuong was fired, she was not paid out her annual leave or given notice. She is owed 3 week's annual leave and should have been paid one week's notice.

She adds an amount for annual leave (\$1534) plus notice (\$511.60) to her claim.

Total underpayment

Phuong adds up these amounts to calculate the total amount she can claim as an underpayment.

Her total underpayment is:

Unpaid wages: \$11,000
Unpaid superannuation: \$1045
Unpaid annual leave: \$1534
Unpaid notice: \$511.60

TOTAL: \$14090.

Part 2: Negotiating with your employer

If you have not already raised the underpayment with your employer, you should do so. If your employer is cooperative, this is the easiest way to rectify the underpayment.

If your employer refuses to pay you what is owed, you should formally request that the money be paid in writing. This is called a letter of demand. By putting the employer on notice that you intend to pursue the underpayment through the relevant tribunal (SAET) or court (Federal Circuit Court) they don't pay, they may be liable to pay additional penalties if your claim does not settle.

An example letter of demand is set out below. This letter of demand threatens a claim in the SAET. List the amounts you are owed and explain why you think you are owed these amounts, with reference to the correct rate. You can attach your calculations to show how you arrived at the underpayment figure.

Dear Mr Boss,

I write regarding my employment with your business. I have been underpaid by you as follows:

1. Underpayment of wages: \$11,000
2. Underpayment of superannuation: \$1045
3. Unpaid annual leave: \$1534
4. Unpaid notice: \$511.60

You did not pay me at the correct award rate. For the period of 1 July 2019 to 30 June 2020, you paid me \$15 an hour. However I should have been paid at Level 3 of the Restaurant Industry Award 2010, as my duties included working in the bar serving alcohol, and helping to train and supervise junior staff. The total amount owing for underpayment of wages is \$11,000.

When you dismissed me on 30 June 2020, you did not pay me notice. You owe me one weeks' notice which is \$511.60. My entitlement to notice can be found in the National Employment Standards.

You also did not pay out my annual leave of 3 weeks. The total owing to me for annual leave is \$1534. My entitlement to annual leave can be found in the National Employment Standards.

The total amount that should have been paid to me was \$29,690. You paid me \$15,600. There is a total amount of \$14090 owing to me.

I request that you make the total payment of \$14,090 to me within 14 days of this letter.

If I do not receive payment within that time, I put you on notice that I will be commencing proceedings for unpaid wages against in the South Australian Employment Tribunal (SAET) without further notice.

If I am forced to commence proceedings against you, I will be seeking an order from the SAET that you pay pecuniary penalties for your various breaches of the civil remedy provisions of the Fair Work Act.

It is hoped that this will not be necessary, and I look forward to a quick and amicable settlement of the outstanding unpaid wages.

Regards,

Phuong

Part 3: Lodging a Money Claim

If the employer does not pay by the date set out in the letter, you should lodge a claim.

There are two places which can deal with an employee's claim to underpayment of wages.

The South Australian Employment Tribunal (SAET) is South Australia's forum for resolving underpayment of wages, and other work-related issues.

You can lodge a Money Claim for your underpayment. See their website for more information.

<https://www.saet.sa.gov.au/industrial-and-employment/money-claims-monetary-claims/>

In some circumstances, you may instead wish to lodge a small claim in the Federal Circuit Court. The Federal Circuit Court also has the power to deal with these disputes. If your claim is under \$20,000, and you wish to claim money against the director personally as well as the business, you can consider lodging a small claim in the Fair Work Division of the Federal Circuit Court.

Seek advice from us or a lawyer if you are considering taking this option.

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